

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 32 and 52

[FAR Case 94-764]

RIN 9000-AG36

Federal Acquisition Regulation;
Contract Financing

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: This proposed rule is issued pursuant to the Federal Acquisition Streamlining Act of 1994, Public Law 103-355 (the Act). The Federal Acquisition Regulatory Council is considering amending the Federal Acquisition Regulation (FAR) pertaining to contract financing as a result of changes to 10 U.S.C. 2307 and 41 U.S.C. 255 by Sections 2001 and 2051 of the Act. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Comment Due Date:* Comments should be submitted on or before May 15, 1995 to be considered in the formulation of a final rule.

Public Meeting: A public meeting will be held on April 3, 1995, at 1 p.m.

Oral/Written Statements: Views to be presented at the public meeting should be sent, in writing, to the FAR Secretariat, at the address given below, not later than March 29, 1995.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4037, Washington, DC 20405, Telephone: (202) 501-4755.

The public meeting will be held at: General Services Administration Auditorium, 18th & F Streets NW., First Floor, Washington, DC 20405.

Please cite FAR case 94-764 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. John Galbraith, Contract Financing/Payment Team Leader, at (703) 697-6710 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 94-764.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, provides authorities that streamline the acquisition process and minimize burdensome government-unique requirements. Major changes that can be expected in the acquisition process as a result of Federal Acquisition Streamlining Act implementation include changes in the areas of Commercial Item Acquisition, Simplified Acquisition Procedures, the Truth in Negotiations Act, and Introduction of the Federal Acquisition Computer Network (FACNET).

This notice announces FAR revisions under FAR case 94-764, Contract Financing. Sections 2001 and 2051 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355), substantially changed the statutory authorities for Government financing of contracts. Subsections 2001(f) and 2051(e) provide specific authority for Government financing of purchases of commercial items, and subsections 2001(b) and 2051(b) substantially revised the authority for Government financing of purchases of non-commercial items. In order to promptly achieve the benefits of the provisions of the Act, the Government is issuing implementing regulations on an expedited basis. We believe prompt publication of proposed rules provides the public the opportunity to participate more fully in the process of developing regulations.

Subsections 2001(f) and 2051(e) provide specific authority for Government financing of purchases of commercial items. These sections amended 10 U.S.C. 2307 and 41 U.S.C. 255 by adding a new paragraph, Conditions for Payments for Commercial Items, to each. These paragraphs authorize the Government to provide contract financing with certain limitations:

- The financing must be in the best interest of the Government;
- The financing cannot exceed 15 percent until some performance of work under the contract;
- The terms and conditions must be appropriate or customary in the commercial marketplace.

The above statutory provisions also remove from financing of commercial purchases certain restrictions applicable to financing of non-commercial purchases by other provisions of 10 U.S.C. 2307 and 41 U.S.C. 255.

Subsections 2001(b) and 2051(b) amend the authority for Government financing of non-commercial purchases

by authorizing financing on the basis of certain classes of measures of performance.

To implement these changes, the DOD, NASA, and GSA propose to amend the FAR by revising Subparts 32.0, 32.1, and 32.5; by adding new Subparts 32.2 and 32.10; and by adding new clauses to 52.232.

The statutory changes create a fundamental distinction between financing of purchases of commercial and non-commercial items. As a result, the subparts of Part 32, Contract Financing, fall into three logical categories:

- Subparts applicable to both commercial and non-commercial financing;
- Subparts applicable to only commercial financing; and
- Subparts applicable to only non-commercial financing.

The specific subparts in each category are identified at 32.002 (Applicability of Subparts).

Subpart Discussion

Subpart 32.0 now contains the general policy and guidance which is applicable to Government contract financing of both commercial and non-commercial items.

Subpart 32.1 (Non-commercial Purchase Financing) now contains the general policy and guidance applicable to non-commercial purchases. The content of this subpart reflects existing policy and guidance that previously appeared in other locations in Part 32. These policies have been moved to Subpart 32.1 to give them general applicability to all forms of financing of non-commercial items.

Subpart 32.2 (Commercial Purchase Financing) contains the policy and guidance applicable to contract financing of commercial purchases. This subpart is wholly new. Current contract financing policy discourages the use of Government contract financing for commercial items (see current FAR 32.502-1(c)), and if financing is provided, it is commonly Progress Payments Based on Cost. The new statute places Government financing of commercial purchases on a different statutory basis than that for non-commercial purchases. As a result, the new subpart provides policy concerning market research about financing, security for the taxpayer's money, and determining the best interest of the United States. The new subpart provides several alternative procedures for establishing contract financing terms for commercial items. The new subpart also provides standard terms for use of contracting officers in establishing

financing in contracts. To assist in considering installment payment financing issues, public comments are sought as to whether or not installment payment financing at 32.206(f) and 52.232-AB should be incorporated into the FAR.

The proposed installment payment clause is intended to permit contracting

officers to incorporate financing into contracts for commercial items without any administrative effort beyond incorporation of the clause. It is intended to be an alternative that may be used when the contracting officer determines that the administrative cost of contract financing for a commercial item would otherwise prohibit its use.

The table below shows how the Installment Payments for Commercial Items clause arithmetic would work for a contract which is awarded in January with various deliveries starting in April and ending in September (bolded numbers indicate delivery payments after liquidation of installment payments).

INSTALLMENT PAYMENTS FOR COMMERCIAL ITEMS (EXAMPLE)

[Amounts shown in thousands of dollars (\$)]

	Qty	\$/Unit	\$Total	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Total
Item 0001	20	20	400	70	70	70	70	120	.....	.....	.....	.....	400
Do	20	20	400	.....	70	70	70	70	120	.....	.....	.....	400
Do	20	20	400	.....	.....	70	70	70	70	120	.....	.....	400
Do	20	20	400	.....	.....	.....	70	70	70	70	120	.....	400
Do	20	20	400	.....	.....	.....	.....	70	70	70	70	120	400
Item 0002	2	15	30	7	7	7	9	.....	.....	.....	.....	.....	30
Do	2	15	30	.....	7	7	7	9	.....	.....	.....	.....	30
Do	2	15	30	.....	.....	7	7	7	9	.....	.....	.....	30
Do	2	15	30	.....	.....	.....	7	7	7	9	.....	.....	30
Do	2	15	30	.....	.....	.....	.....	7	7	7	9	.....	30
Item 0003	10	40	400	56	56	56	56	56	120	.....	.....	.....	400
Do	10	40	400	.....	56	56	56	56	56	120	.....	.....	400
Do	10	40	400	.....	.....	56	56	56	56	56	120	.....	400
Do	10	40	400	.....	.....	.....	56	56	56	56	56	120	400
Finance payment .....	.....	.....	.....	133	266	399	525	525	392	259	126	0	2,625
Delivery payment .....	.....	.....	.....	0	0	0	9	129	249	249	249	240	1,125
Total payment .....	.....	.....	3,750	133	266	399	534	654	641	508	375	240	3,750

Subpart 32.5 (Progress Payments Based on Costs) has been slightly modified to reflect the separation of commercial from non-commercial items and to reflect the general policy in 32.1 for availability of financing for non-commercial purchases.

Subpart 32.10 (Performance-Based Payments) contains the policy and guidance applicable to contract financing through performance-based payments. This is a wholly new subpart. Under the current FAR, contract financing for non-commercial items is primarily through progress payments based on cost and through other specialized contract financing mechanisms for specific types of procurements (for example percentage-of-completion progress payments for shipbuilding or construction). This new subpart provides the policy and procedures for establishing and administering performance-based payments. Performance-based payments under this subpart are applicable only to non-commercial purchases.

FAR 52.232 is amended to add the additional clauses and solicitation provisions required to implement the new statutory authorities. Under the current FAR, the contracting officer can insert a complete, fully contained progress payment clause in a contract and proceed with the procurement with minimal administrative cost. For

performance-based financing and commercial financing (except for installment payments), contracting officers will have to determine the form of contract financing and write individualized contract terms establishing the computation of amounts and certain other contract financing terms.

Public Meeting

The FAR Council is interested in an exchange of ideas and opinions with respect to the regulatory implementation of the Act. For that reason, the FAR Council is conducting a series of public meetings. The public is encouraged to furnish its views; the FAR Council anticipates that public comments will be very helpful in formulating final rules.

The public meeting on this rule (FAR case 94-764) will be held on April 3, 1995, at 1 p.m., to enable the public to present its views on this rule. This meeting will coincide with the meeting on Commercial Items (FAR case 94-790) which is now also scheduled for April 3, 1995. Persons or organizations wishing to make presentations will be allowed 10 minutes each, provided they notify the FAR Secretariat at (202) 501-4755 and submit written statements of the presentation by March 29, 1995. Persons or organizations with similar positions are encouraged to select a

common spokesman for presentation of their views. This meeting, in conjunction with the **Federal Register** notice soliciting public comments on the rule, will be the only opportunity for the public to present its views.

B. Regulatory Flexibility Act

This proposed rule is expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the proposed implementation of subsection 2001(f) and subsection 2051(e) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) will substantially increase the availability of Government contract financing for purchases of commercial items, thereby benefiting many small entities making commercial sales in markets where customer financing is a market practice; and because the implementation of subsection 2001(b) and subsection 2051(b) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) permits contract financing of purchases of non-commercial items upon the basis of performance, without requiring contractor cost accounting systems for the contract financing, thereby benefiting many small entities who do not use such systems. An Initial Regulatory Flexibility Analysis has been

performed. Comments from small entities concerning the affected FAR subparts will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 94-764), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the proposed rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning Contract Financing is being submitted to the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Public comments concerning this request are invited in a **Federal Register** notice which appears elsewhere in this issue.

List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: March 8, 1995.

Capt. Barry L. Cohen,

Project Manager for the Implementation of the Federal Acquisition Streamlining Act of 1994.

Therefore, it is proposed that 48 CFR Parts 32 and 52 be amended as set forth below:

PART 32—CONTRACT FINANCING

1. The authority citation for 48 CFR Parts 32 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

2. Section 32.000 is amended in paragraph (e) by removing the word "and"; in paragraph (f) by removing the period and inserting a semicolon in its place; and by adding paragraphs (g) and (h) to read as follows:

32.000 Scope of part.

* * * * *

(g) Financing of purchases of commercial items; and

(h) Performance-based payments.

3. Section 32.001 is amended by revising the section heading and adding, in alphabetical order, the definitions *Customary contract financing* and *Unusual contract financing* to read as follows:

32.001 Definitions.

Customary contract financing means that financing deemed by an agency to be available for routine use by contracting officers. Most customary contract financing arrangements should

be usable by contracting officers without specific reviews or approvals of the financing arrangement by higher management. It is expected that contracting officers will have the necessary training and resources to routinely arrange and/or administer (including paying) any financing terms the agency deems customary for that agency.

Unusual contract financing means any financing not deemed customary contract financing by the agency. Normally, unusual contract financing is that financing that is legal and proper under applicable laws, but that the agency has not authorized contracting officers to use without specific reviews or approvals of the financing arrangement by higher management. Arranging and/or administering (including paying) unusual contract financing may require more and/or different training or resources than the agency routinely makes available for such operations, or may have greater or different risks than the financing arrangements deemed customary by the agency.

4. Sections 32.002 through 32.005 are added to read as follows:

32.002 Applicability of subparts.

(a) The following subparts of this part are applicable to all purchases subject to part 32:

(1) Subpart 32.0, General.

(2) Subpart 32.3, Loan Guarantees for Defense Production.

(3) Subpart 32.6, Contract Debts.

(4) Subpart 32.7, Contract Funding.

(5) Subpart 32.8, Assignment of Claims.

(6) Subpart 32.9, Prompt Payment.

(b) Subpart 32.2, Commercial Purchase Financing, is applicable only to purchases of commercial items under authority of 48 CFR part 12.

(c) The following subparts of this part are applicable to all purchases made under any authority other than 48 CFR Part 12:

(1) Subpart 32.1, Non-Commercial Purchase Financing.

(2) Subpart 32.4, Advance Payments.

(3) Subpart 32.5, Progress Payments for Supplies or Services.

(4) Subpart 32.10, Performance-Based Payments.

32.003 Simplified acquisition procedures financing.

Unless agency regulations otherwise permit, contract financing shall not be provided for purchases made under the authority of 48 CFR Part 13.

32.004 Contract performance in foreign countries.

The enforceability of contract provisions for security of Government financing in a foreign jurisdiction is dependent upon local law and procedure. Prior to providing contract financing where foreign jurisdictions may become involved, the contracting officer shall ensure the Government's security is enforceable. This may require the provision of additional or different security than that normally provided for in the standard contract clauses.

32.005 Consideration for contract financing.

(a) *Requirement.* When a contract financing clause is included at the inception of a contract, there shall be no separate consideration for the contract financing clause. The worth of the contract financing to the contractor is expected to be reflected in one or both of (1) a bid or negotiated price that will be lower than such price would have been in the absence of the contract financing, or (2) contract terms and conditions, other than price, that are more beneficial to the Government than they would have been in the absence of the contract financing. Adequate new consideration is required for changes to, or addition of, contract financing after award.

(b) *Amount of new consideration.* The contractor may provide new consideration by monetary or nonmonetary means, provided the value is adequate. The fair and reasonable consideration should approximate the amount by which the price would have been less had the contract financing terms been contained in the initial contract. In the absence of definite information on this point, the contracting officer should apply the following criteria in evaluating whether the proposed new consideration is adequate:

(1) The value to the contractor of the anticipated amount and duration of the contract financing at the imputed financial costs of the equivalent working capital.

(2) The estimated profit rate to be earned through contract performance.

(c) *Interest.* Except as provided in Subpart 32.4 (Advance Payments), the contract shall not provide for any other type of specific charges, such as interest, on contract financing.

5. Subpart 32.1 heading and section 32.100 are revised to read as follows:

Subpart 32.1—Non-Commercial Purchase Financing

32.100 Scope of subpart.

This subpart provides policies and procedures applicable generally to contract financing and payment for any purchases other than purchases of commercial items in accordance with 48 CFR Part 12.

32.101 [Amended]

6. Section 32.101 is amended by removing the period at the end of the section and inserting in its place “, as amended.”

7. Section 32.102 is amended in the last sentence of paragraph (a) by removing the word “subadvances” and inserting in its place “advances”; in paragraph (b)(2) by removing the word “or”; in paragraph (b)(3) by removing the period and inserting in its place “; or”; and adding paragraphs (b)(4) and (f) to read as follows:

32.102 Description of contract financing methods.

* * * * *

(b) * * *

(4) Performance-based payments.

* * * * *

(f) Performance-based payments are contract financing payments made on the basis of—

- (1) Performance measured by objective, quantifiable methods;
- (2) Accomplishment of defined events; or
- (3) Other quantifiable measures of results.

32.103 Progress payments under construction contracts.

8. Section 32.103 is amended by revising the section heading to read as set forth above; and by removing the word “the” in the second sentence.

9. Section 32.104 is amended by adding paragraphs (c) through (f) to read as follows:

32.104 Providing contract financing.

* * * * *

(c) Subject to specific agency regulations, contract financing may be provided when the contracting officer determines it is in the best interest of the Government. Unless authorized by agency regulation, contract financing shall not be provided for awards expected to be less than the simplified acquisition procedure threshold, and unless the provision of financing is restricted to small businesses, shall not be provided for awards expected to be less than \$1 million.

(d) Whenever practical, contracting officers should use performance-based payments (see subpart 32.10).

(e) For competitive awards, the contracting officer shall include the intended contract financing terms in the solicitation, in accordance with this part and any agency regulations. Contract financing shall not be a factor in the evaluation of resulting proposals, and proposals which contain alternative financing terms shall not be accepted (but see subparts 14.2 and 15.6 concerning alternative proposals and amendments of solicitations).

(f) When only one source is solicited, the contracting officer shall include the intended contract financing terms in the solicitation in accordance with this part and any agency regulations. In negotiations of the resulting contract, if the contract financing is to be through performance-based payments in accordance with subpart 32.10, the contracting officer shall ensure that the combination of price and financing is fair and reasonable, all factors, including financing cost to the Treasury, considered.

10. Section 32.106 is amended in the introductory text by inserting after “Government’s” the word “best”; and by revising paragraphs (b) and (d) to read as follows:

32.106 Order of preference.

* * * * *

(b) Customary contract financing (see 32.113).

* * * * *

(d) Unusual contract financing (see 32.114).

* * * * *

32.110 [Reserved]

11. Section 32.110 is removed and reserved.

32.111 Contract clauses for non-commercial purchases.

12. The section heading for 32.111 is revised to read as set forth above.

13. Sections 32.113 and 32.114 are added to read as follows:

(Note to Readers: The proposed text of 32.112 is contained in FAR case 94-762, which was published for public comment at 60 FR 6602, February 2, 1995. Comments concerning the proposed text for 32.112 should be submitted separately and reference that FAR case 94-762.)

32.113 Customary contract financing.

The following contract financing arrangements are customary contract financing when provided in accordance with this part 32 and agency regulations:

(a) Financing of shipbuilding, or ship conversion, alteration, or repair, when agency regulations provide for progress payments based on a percentage or stage of completion;

(b) Financing of construction or architect-engineer services purchased under the authority of 48 CFR part 36, in accordance with this part;

(c) For small businesses, financing of contracts for supplies or services with a contract price equal to or greater than the simplified acquisition procedure threshold through customary performance-based payments in accordance with subpart 32.10, or customary progress payments in accordance with subpart 32.5 (but not both);

(d) Financing of contracts for supplies or services with a contract price of \$1 million or more, through customary performance-based payments in accordance with subpart 32.10, or customary progress payments in accordance with subpart 32.5 (but not both);

(e) Financing of contracts for supplies or services through Advance Payments in accordance with subpart 32.4;

(f) Financing of contracts for supplies or services through Guaranteed Loans in accordance with subpart 32.3; or

(g) Financing of contracts for supplies or services through any appropriate combination of Advance Payments, Guaranteed Loans, and either customary performance-based payments or customary progress payments (but not both) in accordance with their respective subparts.

32.114 Unusual contract financing.

Any contract financing arrangement that deviates from the policy, procedures, terms, or conditions of this part is unusual contract financing. Unusual contract financing shall be authorized only after approval by the head of the agency or as provided for in agency regulations.

14. Subpart 32.2, consisting of sections 32.200 through 32.207, is added to read as follows:

Subpart 32.2—Commercial Purchase Financing

Sec.

32.200 Scope of subpart.

32.201 Statutory authority.

32.202 General.

32.202-1 Policy.

32.202-2 Types of payments for commercial purchases.

32.202-3 Conducting market research about financing terms.

32.202-4 Security for Government financing.

32.203 Procedures for determining contract financing terms.

32.204 Procedures for contracting officer-specified commercial contract financing.

32.205 Procedures for offeror-proposed commercial contract financing.

32.206 Construction of contract clauses.

32.207 Administration and payment of commercial financing payments.

32.200 Scope of subpart.

This subpart provides policies and procedures for commercial financing arrangements under commercial purchases pursuant to 48 CFR part 12. This subpart does not apply to any purchase made under other authority.

32.201 Statutory authority.

10 U.S.C. 2307(f) and 41 U.S.C. 255(f) provide that payment for commercial items may be made under such terms and conditions as the head of the agency determines are appropriate or customary in the commercial marketplace and are in the best interest of the United States.

32.202 General.**32.202-1 Policy.**

(a) *Use of financing in contracts.* It is the responsibility of the contractor to provide all resources needed for performance of the contract. Thus, for Government purchases of commercial items, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer shall include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.

(b) *Authorization.* Commercial interim payments and commercial advance payments may be made under the following circumstances—

- (1) The contract item financed is a commercial supply item;
- (2) The contracting officer determines that it is customary in the commercial marketplace to make financing payments for the item;
- (3) Authorizing this form of contract financing is in the best interest of the Government (see 32.202-1(e));
- (4) Adequate security is obtained (see 32.202-4);
- (5) Prior to any performance of work under the contract, the aggregate of commercial advance payments shall not exceed 15 percent of the contract price; and
- (6) The contract is awarded on the basis of competitive procedures or, if only one offer is solicited, adequate consideration is obtained (based on the time value of financing to be provided) if the financing is expected to be substantially more advantageous to the offeror than the offeror's normal method of customer financing.

(c) *Difference from non-commercial financing.* Government financing of commercial purchases under this subpart 32.2 is expected to be different from that used for non-commercial

purchases under subpart 32.1 and its related subparts. While the contracting officer may adapt techniques and procedures from the non-commercial subparts for use in implementing commercial contract financing arrangements, the contracting officer must have a full understanding of effects of the differing contract environments and of what is needed to protect the interests of the Government in commercial contract financing.

(d) *Unusual contract financing.* Any contract financing arrangement not in accord with the requirements of agency regulations or 48 CFR part 32 is unusual contract financing and requires advance approval in accordance with agency procedures. If not otherwise specified, such unusual contract financing shall be approved by the head of the contracting activity.

(e) *Best interest of the Government.* (1) The statute does not allow contract financing by the Government where it is not in the best interest of the United States. The contracting officer in deciding for individual procurements whether to use contract financing and, if so, the methods and techniques therefor, shall consider the interests of the United States in accordance with agency regulations. The interests of the United States may include—

- (i) The cost to the Government of providing the financing (e.g., Treasury borrowing costs);
- (ii) The transaction costs to the Government of establishing and negotiating the financing terms, and administrative costs of administering the financing terms;
- (iii) Execution of Executive branch and agency policy;
- (iv) Compliance with fiscal and budgetary requirements;
- (v) Promotion of competition through new market entrants;
- (vi) Acquisition of advanced, state-of-the-art technology; and
- (vii) Integration of the industrial bases for defense, commercial, and Governmental markets.

(2) In considering policy to determine whether financing is in the best interest of the Government, the best interests of the Government are usually served by an appropriate trade-off of the transaction costs of the procurement, against the optimizing of the price and financing of the individual purchase. Agencies may find that certain types of procurements, certain types of items, or certain dollar levels of procurements do not justify the transaction costs of financing or do not justify high-cost procedures for determining financing. The specifics of these factors will vary

from agency to agency, and, possibly, from office to office or time to time.

32.202-2 Types of payments for commercial purchases.

These definitions reflect distinctions made in the statutory commercial financing authority and the implementation of the Prompt Payment Act.

Commercial advance payment means a payment made before any performance of work under the contract. The aggregate of these payments shall not exceed 15 percent of the contract price. These payments are contract financing payments for prompt payment purposes (i.e., not subject to the interest penalty provisions of the Prompt Payment Act in accordance with subpart 32.9). These payments are not subject to subpart 32.4.

Commercial interim payment means any payment that is not a commercial advance payment or a delivery payment. These payments are contract financing payments for prompt payment purposes (i.e., not subject to the interest penalty provisions of the Prompt Payment Act in accordance with subpart 32.9). The difference between a commercial advance and commercial interim payment for Government contract purposes is whether some performance of the work under the contract has been accomplished.

Delivery payment means a payment for accepted supplies or services, including payments for accepted partial deliveries. Commercial financing payments are liquidated by deduction from these payments. Delivery payments are invoice payments for prompt payment purposes.

32.202-3 Conducting market research about financing terms.

(a) If contract financing is expected to be in the best interest of the Government (see 32.202-1(e) of this subpart), contract financing shall be a subject included in the market research conducted in accordance with 48 CFR part 10 (Market Research). Contracting officers shall determine for commercial purchases in the appropriate market—

(1) The extent to which other buyers provide contract financing for purchases in that market;

(2) The overall level of financing normally provided;

(3) The amount or percentages of any payments equivalent to commercial advance payments (32.202-2);

(4) The basis for any payments equivalent to commercial interim payments (32.202-2), as well as the frequency, and amounts or percentages; and

(5) Any special or unusual payment terms applicable to the equivalent of delivery payments (32.202-2).

(b) When adequate and current information is already available, contract financing market research does not have to be repeated. Similarly, procuring activities making repetitive purchases in specific markets may provide contracting officers with contract financing terms for use in purchases in those markets.

(c) *Customary standard market terms* means those contract financing terms and conditions that are the usual, regular terms offered by a substantial number of sellers to equivalent buyers of the item in that market at that time. Customary standard market terms are not required to be identical for all sellers, but are expected to be similar. Terms may reasonably vary in percentages, or timing, or other terms and still be considered customary standard market terms, so long as they do not significantly differ in the overall impact upon the Government, including the impact upon the integrity of competitive procurements. If the extent of variation in the terms offered by diverse sellers is such that some potential offerors would be significantly advantaged or disadvantaged by a synthesis of the various terms, the contracting officer may find there are no customary standard market terms. The extent of analysis applied in making these determinations should be commensurate with the expected size of the contract and amount of contract financing.

32.202-4 Security for Government financing.

(a) *Policy.* 10 U.S.C. 2307(f) and 41 U.S.C. 255(f) require the Government to obtain adequate security for Government financing. The contracting officer shall determine what security the Government will accept, which shall be specified in the solicitation. If the Government is willing to accept more than one form of security, the offeror shall be required to specify the form of security it will provide. The value of the security must be at least equal to the unliquidated amount of contract financing payments to be made to the contractor. If acceptable to the contracting officer, the resulting contract shall specify the security (see 32.206(b)(1)(iv) and also paragraph (f), Security for Government Financing of the clause at 52.232-AA, Standard Terms for Government Financing of Purchases of Commercial Items, or paragraph (f) of the clause at 52.232-AB, Installment Payments for Commercial Items). The amount of security provided

by the contractor may be adjusted from time to time during the period of performance, so long as it is always equal to or greater than the amount of unliquidated financing that is paid to the contractor. Paragraphs (b), (c), and (d) of this section list some (but not all) forms of security that the contracting officer may find acceptable. There is no order of preference in this listing, and a form not listed is of equal acceptability if the contracting officer finds it adequate.

(b) *Paramount lien.* (1) The statutes cited in 32.201 provide that if the Government's security is in the form of a lien, such lien is paramount to all other liens and is effective immediately upon the first payment, without filing, notice, or other action by the United States.

(2) When the Government's security is in the form of a lien, the contract shall specify what the lien is upon, e.g., the work in process, the contractor's plant, the contractor's inventory. Contracting officers may be flexible in the choice of assets, so long as it is adequate. The contract must also give the Government a right to verify the existence and value of the assets.

(3) Provision of Government financing shall be conditioned upon a contractor certification that the assets subject to the lien are free from any prior encumbrances. Prior liens may result from such things as capital equipment loans, installment purchases, working capital loans, various lines of credit, and revolving credit arrangements.

(c) *Other assets as security.* (1) Contracting officers may consider the guidance at 28.203-2, 28.203-3, and 28.204 in determining which types of assets may be acceptable as security. For the purpose of applying the guidance in part 28 to this section, the term *surety* and/or *individual surety* should be interpreted to mean *offeror* and/or *contractor*.

(2) Subject to agency regulations, the contracting officer may also consider the net worth of the offeror in relation to the maximum amount of Government funds at risk. If the contracting officer finds that the unencumbered net worth of the offeror will be significantly in excess of the total unliquidated Government financing (on all Government contracts using this form of security), and the offeror agrees to provide additional security should that net worth become encumbered or materially reduced, the contracting officer may determine the Government has adequate security.

(d) *Other forms of security.* Other acceptable forms of security include—

(1) An irrevocable letter of credit from a federally insured financial institution;

(2) A bond from a surety acceptable in accordance with 48 CFR part 28 (note that the bond must guarantee repayment of the unliquidated contract financing);

(3) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or

(4) Title to identified contractor assets of adequate worth.

32.203 Procedures for determining contract financing terms.

(a) *Selection procedure.* When the criteria in 32.202-1(b) are met:

(1) If market research discloses that contract financing is not customary in the commercial market, the contracting officer shall not provide for financing in the solicitation and contract;

(2) If market research discloses customary standard market terms for commercial financing in a market, the contracting officer shall use the contracting officer-specified financing procedure at 32.204 and specify the customary standard market terms in the solicitation and contract; or

(3) If market research discloses that contract financing is customary in the commercial market but there are no customary standard market terms, the contracting officer shall, in accordance with agency regulations, use the contracting officer-specified procedure at 32.204, the offeror-proposed procedure at 32.205, or other agency specified procedure or technique. If agency regulations do not provide otherwise, the contracting officer shall use the contracting officer-specified procedure at 32.204 for purchases expected to be less than \$5 million and may use the offeror-proposed procedure at 32.205 for purchases expected to be \$5 million or more.

(b) *Summary of contracting officer-specified financing procedure.* Under the contracting officer-specified procedure at 32.204, the Government specifies the contract financing terms in the solicitation. The contracting officer does not evaluate or adjust prices for financing terms. Contracting officer-specified contract financing terms are designed to allow reasonable contract financing of purchases with minimum transaction costs. Under this procedure, the contract financing for any particular procurement is based upon the financing terms commonly used in the particular market, or the terms the Government finds appropriate to the purchase.

(c) *Summary of offeror-proposed financing procedure.* Under the offeror-proposed procedure at 32.205, offerors are invited to propose contract financing

terms. The contracting officer then evaluates all of the financing terms and prices to determine the evaluated price. The evaluated price is based upon the net cost to the Government of the proposed price and financing terms.

(d) *Front-end loading of financing terms.* In establishing contract financing terms, the contracting officer must be aware of certain risks. While contract financing payments may be made at the beginning and during the early period of a contract, very high amounts of financing early in the contract may unduly increase the risk to the Government. Contracting officers cannot consider various aspects of financing separately; the security and the amounts and timing of financing payments must be analyzed as a whole to determine whether the arrangement will be in the best interest of the Government. Under the contracting-officer specified procedure, large, early, contract financing payments are not prohibited if they are the customary standard market terms and an appropriate quality of security is obtained. Under the offeror-proposed procedure, large, early, contract financing payments are not prohibited if such payments are usual or common in the offeror's sales equivalent to the size and type of the instant Government purchase and an appropriate quality of security is obtained.

(e) *Optional nature of contract financing terms.* (1) A contracting officer determination that contract financing is customary in a commercial market, while establishing the Government's authority to offer or agree to contract financing, does not preclude an offeror from bidding or proposing on the basis of no contract financing. Similarly, the presence of a contract financing clause in a contract does not preclude a contractor forbearance in its exercise (see 32.207(f)).

(2) For solicitations under contracting officer-specified procedures, an offer stating that the contracting officer-specified contract financing terms will not be used by the offeror does not alter the evaluation of the offer (see 32.204(b)) nor does it render the offer nonresponsive or otherwise unacceptable. In the event of award to an offeror whose offer declined the proposed contract financing, the contract financing provisions shall not be included in the resulting contract.

(3) For solicitations under offeror-proposed procedures, a proposal containing no contract financing provisions or stating that contract financing is not proposed, shall, in lieu of the computation in 32.205(c), be evaluated as having no additional cost

to the United States for providing contract financing.

32.204 Procedures for contracting-officer-specified commercial contract financing.

(a) *Financing terms.* Under this procedure, the solicitation specifies the financing terms that will be used in any resulting contract.

(b) *Determination of contract financing terms.* The contracting officer shall determine the contract financing terms based upon the results of market research and prepare a written rationale for the terms. If the contracting officer determines there is variation between sellers within the customary standard market terms (see 32.202–3(c)), the contract financing terms specified by the contracting officer shall be within those variations. The financing terms shall be incorporated in the solicitation. Contract financing shall not be a factor in evaluation of resulting proposals, and proposals of alternative financing terms shall not be accepted (but see 14.208 and 15.606 concerning amendments of solicitations). Contract financing shall not be a basis for adjusting offerors' proposed prices because the effect of contract financing is reflected in each offeror's proposed prices.

32.205 Procedures for offeror-proposed commercial contract financing.

(a) Under this procedure, each offeror may propose financing terms. The contracting officer must then determine which offer is in the best interest of the United States.

(b) *Solicitations.* The contracting officer shall include in the solicitation the Invitation to Propose Contract Financing Terms at 52.232–AC. The contracting officer shall also—

(1) Specify the effective delivery payment (invoice) dates that will be used in the evaluation of financing proposals; and

(2) Specify the interest rate to be used in the evaluation of financing proposals (see (c)(4) of this section).

(c) *Evaluation of proposals.* (1) When contract financing terms vary between offerors, the contracting officer must adjust each proposed price for evaluation purposes to reflect the cost to the United States of providing the proposed financing in order to determine the total cost to the United States of that particular combination of price and financing.

(2) Contract financing results in the Government making financing payments earlier than it otherwise would as delivery payments. The cost to the Government of providing contract financing is the Government's imputed cost of those earlier-than-otherwise-

required payments. In order to determine the cost to the Government for providing financing, the contracting officer must compute that imputed cost of financing and add it to the proposed price to determine the evaluated price for each offeror.

(3) The imputed cost of a single financing payment is the amount of the payment multiplied by the annual interest rate, multiplied by the number of years between the date of payment of the financing payment and the date the amount would have been paid as a delivery payment. The imputed cost of financing is the sum of the imputed costs of each of the financing payments.

(4) The time value of offeror-proposed contract financing arrangements shall be calculated using as the interest rate the Nominal Discount Rate specified in Appendix C of OMB Circular A–94, Benefit-Cost Analysis of Federal Programs; Guidelines and Discounts, appropriate to the period of contract financing. This Appendix is updated yearly and is available from the Office of Economic Policy in the Office of Management and Budget (OMB).

32.206 Construction of contract clauses.

(a) Unless otherwise authorized by agency regulations, the contract shall contain the paragraph entitled Payment of the clause at 52.212–4. If the contract will provide for contract financing, the contracting officer shall construct a solicitation provision and contract clause for any resulting contract. This solicitation provision shall be constructed in accordance with 32.204 or 32.205. If the procedure at 32.205 is used, the solicitation provision Invitation to Propose Financing Terms at 52.232–AC shall be included. The contract clause shall be constructed in accordance with the requirements of this subpart and any agency regulations.

(b) Each contract financing clause shall have the following structure:

(1) One or more paragraphs describing the—

(i) Computation of the financing payment amounts;

(ii) Specific conditions of contractor entitlement to those financing payments;

(iii) Liquidation of those financing payments by delivery payments;

(iv) Specifics of the security under the contract, any terms or conditions specifically applicable thereto; and

(v) Frequency, form, and any additional content of the contractor's request for financing payment (in addition to the requirements of the clause Standard Terms for Government Financing of Purchases of Commercial Items at 52.232–AA), which paragraph

shall limit the frequency of requests to no more than one per month, unless otherwise authorized by agency regulation.

(2) Unless agency regulations authorize alterations, the unaltered text of the clause at 52.232-AA, Standard Terms for Government Financing of Purchases of Commercial Items.

(c) *Computation of amounts, and contractor entitlement provisions.* Contracts shall provide that delivery payments shall be made only for completed goods and services accepted by the Government in accordance with the terms of the contract. Contracts may provide for commercial advance and commercial interim payments based upon a wide variety of bases, including (but not limited to) achievement or occurrence of specified events, the passage of time, or specified times prior to the delivery date(s). The basis for payment must be objectively determinable. It is expected that the basis for payment for customary standard market terms is one that is documented by the records and controls maintained by a prudent business person in the normal course of business in that market. Therefore, in establishing the basis for contract financing payments under the contracting-officer specified procedure, the contracting officer normally should be guided by the customary standard market terms. Under the offeror-proposed procedure, the offeror is responsible for proposing terms it can implement.

(d) *Instructions for multiple appropriations.* If contract financing is to be computed for the contract as a whole, and if there is more than one appropriation account (or subaccount) funding payments under the contract, the contracting officer shall include in the contract instructions for distribution of financing payments to the respective funds accounts.

(e) *Prompt payment for commercial purchase payments.* The provisions of subpart 32.9, Prompt Payment, apply to contract financing and invoice payments for commercial purchases in the same manner they apply to contract financing and invoice payments for non-commercial purchases. The contracting officer, in constructing financing and payment terms for commercial purchases, is responsible for including in the contract all the information necessary to implement prompt payment. In particular, contracting officers must be careful to clearly differentiate in the contract between contract financing and invoice payments and between items having different prompt payment times.

(f) *Installment payment financing for commercial items.* Contracting officers may insert the clause at 52.232-AB, Installment Payments for Commercial Items, in contracts and solicitations in lieu of constructing a specific clause in accordance with paragraphs (b) through (e) of this section when the contracting officer determines that this clause is appropriate and in the best interest of the Government.

(1) *Description.* Installment payment financing is payment by the Government to a contractor of a fixed number of equal interim financing payments prior to delivery and acceptance of a contract item. The installment payment arrangement is designed to reduce administrative costs. However, if a contract will have a large number of deliveries, the administrative costs may increase to the point where installment payments are not in the best interest of the Government.

(2) *Authorized types of installment financing payments and rates.* Installment financing payments may be made using the clause at 52.232-AB, Installment Payments for Commercial Items, either at the 70 percent financing rate cited in the clause or at any other lower rate in accordance with agency procedures.

(3) *Calculating the amount of installment financing payments.* The contracting officer shall identify in the contract schedule those items for which installment financing payments are authorized. Monthly installment financing payment amounts are to be calculated by the contractor pursuant to the instructions in the contract clause only for items authorized to receive installment financing payments.

(4) *Liquidating installment payment financing payments.* If installment financing payments have been made for an item, the amount paid to the contractor upon acceptance of the item by the Government shall be reduced by the amount of installment financing payments made for the item in order to liquidate all installment financing payments previously made for the item. The contractors request for final payment for each item is required to show this calculation.

32.207 Administration and payment of commercial financing payments.

(a) *Responsibility.* The contracting officer responsible for administration of the contract shall be responsible for review and approval of contract financing requests.

(b) *Approval of financing requests.* Unless otherwise provided in agency regulations, or by agreement with the appropriate payment official:

(1) The contracting officer shall be responsible for receiving, approving, and transmitting all contract financing requests to the appropriate payment office; and

(2) Each approval shall specify the amount to be paid, necessary contractual information, and the account(s) (see 32.206(d)) to be charged for the payment.

(c) *Reviews.* Because the basis for payments can vary widely, the contracting officer is responsible for determining what reviews, either pre- or post- payment, are required for protection of the Government's interests. The contracting officer, in approving financing payments, may rely upon contractor certifications and internal management, accounting, and data practices or systems, provided the contracting officer has determined that those practices or systems are reliable and that appropriate reviews are conducted to verify their continued reliability.

(d) *Financial surveillance.* The contracting officer is responsible for monitoring the contractor's overall financial condition. The contract financing provisions, entitled Suspension and Reduction of Financing Payments, and Reports and Government Access, of the clauses at 52.232-AA and 52.232-AB, specifically give the Government rights to information in this area.

(e) *Management of security.* After contract award, the contracting officer responsible for approving requests for financing payments shall be responsible for determining that the security continues to be adequate.

(f) *Limits on Government access.* (1) Unless the contractor requests contract financing under a contract financing clause, the associated Government rights granted by the Records, reports and access provisions of the contract financing clauses (e.g., access to records) are inoperative.

(2) The Government rights granted by the Records, reports, and access provisions of contract financing clauses are for the purpose of ensuring the accuracy and safety of the Government's financing payments and shall not be used for any other purpose.

15. Section 32.501-1 is amended by revising paragraph (d) to read as follows:

32.501-1 Customary progress payment rates.

* * * * *

(d) In accordance with the Defense Procurement Improvement Act of 1986 (Pub. L. 99-145), as amended, and, for civilian agencies, in accordance with 41

U.S.C. 255, as amended, progress payments are limited to 80 percent on work accomplished under undefinitized contract actions. A higher rate is not authorized under unusual progress payments or other customary progress payments for the undefinitized actions.

32.501-4 [Removed]

16. Section 32.501-4 is removed.

17. Section 32.502-1 is amended in paragraph (a) introductory text by removing the phrase "paragraphs (b) and (c) below," and inserting in its place "paragraph (b) of this section,"; by revising paragraph (b) introductory text and (b)(1); by removing paragraph (c); by redesignating paragraph (d) as paragraph (c); and in newly designated paragraph (c)(1) by removing the phrase "through (c) above," and inserting in its place "and (b) of this section,". The revised text reads as follows:

32.502-1 Use of customary progress payments.

* * * * *

(b) To reduce undue administrative effort and expense, unless otherwise provided in agency regulations, the contracting officer shall not provide for progress payments on contracts of less than \$1 million unless—

(1) The contractor is a small business concern and the contract will be equal to or greater than the simplified acquisition procedure threshold; or

* * * * *

18. Subpart 32.10, consisting of sections 32.1000 through 32.1011, is added to read as follows:

Subpart 32.10—Performance-Based Payments

Sec.	
32.1000	Scope of subpart.
32.1001	Policy.
32.1002	Bases for performance-based payments.
32.1003	Criteria for use.
32.1004	Procedure.
32.1005	Solicitation provisions and contract clause.
32.1006	Agency approvals.
32.1007	Administration of performance-based payments.
32.1008	Suspension or reduction of performance-based payments.
32.1009	Title.
32.1010	Risk of loss.
32.1011	Performance-based payments for events.

32.1000 Scope of subpart.

This subpart provides policy and procedures, and prescribes contract clauses for performance-based payments under non-commercial purchases pursuant to subpart 32.1. This subpart does not apply to—

(a) Payments under cost-reimbursement contracts;

(b) Contracts for architect-engineer services or construction or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based upon a percentage or stage of completion;

(c) Contracts for research or development; or

(d) Contracts awarded through sealed bid procedures.

32.1001 Policy.

(a) Performance-based payments are contract financing payments and, when authorized by the contract, are to be used to pay a contractor on bases which do not involve acceptance by the Government.

(b) Performance-based payments are fully recoverable, in the same manner as progress payments, in the event of default. Except as provided in 32.1003(c), where performance-based payments are used, they shall be the exclusive method of contract financing in the contract in accordance with subpart 32.1.

(c) Contractors shall maintain an appropriate investment in their contract at all times.

(d) For Government accounting purposes, performance-based payments should be treated like progress payments based on costs under subpart 32.5.

(e) Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of prompt payment. However, these payments shall be made in accordance with the agency's policy for contract financing payments.

32.1002 Bases for performance-based payments.

Performance-based payments may be made on any of the following bases:

(a) Performance measured by objective, quantifiable methods,

(b) Accomplishment of defined events, or

(c) Other quantifiable measures of results.

32.1003 Criteria for use.

Performance-based payments shall be used only if the following conditions are met:

(a) The contract meets any criteria established by agency regulations in accordance with subpart 32.1,

(b) The contract is a definitized fixed-price type contract, and

(c) The contract does not provide for other methods of contract financing, except that advance payments in accordance with subpart 32.4, or Guaranteed Loans in accordance with subpart 32.3 may be used.

32.1004 Procedure.

Performance-based financing payments may be made either on a whole contract basis or on a deliverable item basis, unless otherwise prescribed by agency regulations.

(a) *Establishing performance bases.* Each event or performance criteria that will trigger payment of a performance-based finance payment amount shall be an integral and necessary part of contract performance and shall be identified in the contract, along with a description of what constitutes successful performance of the event or attainment of the performance criteria. An event need not be a critical event in order to trigger a payment, but successful performance of each such event or performance criteria shall be readily verifiable. A contractor shall not be paid for an event or performance criteria until previously scheduled events or prior performance criteria have been successfully performed. If payment of performance-based finance amounts is on a deliverable item basis, each event or performance criteria shall be part of the performance necessary for that deliverable item and shall be identified to a specific contract line item or subline item.

(b) *Establishing performance-based finance payment amounts.* The contracting officer responsible for establishing the price of a contract also shall establish a complete, fully defined schedule of performance-based payments when establishing the price of the contract. If a contract action significantly affects the price, or event or performance criteria, the contracting officer responsible for pricing the contract modification shall adjust the performance-based payment schedule appropriately. The payment amounts should be adequate to ensure that the contractor maintains an appropriate investment in work in process inventory and total performance-based finance payments shall not exceed 75 percent of the contract price, if on a whole contract basis, or 75 percent of the delivery item price if on a delivery item basis. Performance-based finance payment amounts may be established on the basis of—

(1) The estimated projected cost of performance of the entire contract, or of specific line items, as of the date of each event;

(2) The estimated projected cost of performance of the entire contract, or of specific line items, as of the date of attainment of each performance criteria;

(3) The estimated projected cost of performance of particular events; or

(4) Any other rational basis determined by the contracting officer or agency procedures.

(c) *Instructions for multiple appropriations.* If the whole contract approach is used and there is more than one appropriation account (or sub account) funding payments under the contract, the contracting officer shall include in the contract instructions for distribution of financing payments to the respective funds accounts.

(d) *Liquidating performance-based finance payments.* Performance-based finance amounts shall be liquidated by deducting a percentage or a designated dollar amount from the delivery payment.

(1) If the performance-based finance payments are on a delivery item basis, the liquidation amount for each such line item shall be the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount.

(2) If the performance-based finance payments are on a whole contract basis, liquidation shall be by either predesignated liquidation amounts or a liquidation percentage. In order to ensure proper liquidation, performance-based financing payments made after any payment for a deliverable item shall be adjusted to reflect the amount of previous delivery payments. (For example, if \$3 million of performance-based financing payments have been made under a \$10 million contract, the liquidation percentage would be 30 percent.)

(e) *Late payment penalties.* Performance-based payments are contract financing payments and, therefore, are not subject to the interest-penalty provisions of the Prompt Payment Act in accordance with subpart 32.9. However, these payments shall be made in accordance with the agency's policy for contract financing payments.

32.1005 Solicitation provisions and contract clause.

(a) If performance-based contract financing will be provided, the contracting officer shall insert the clause at 52.232-BD, Performance-Based Payments, with the description of the basis for payment and liquidation as required in 32.1004 in the solicitation and resulting contract.

(b) The contracting officer shall insert the provision at 52.232-BB, Notice of Performance-Based Payments, in requests for proposals that include a Performance-Based Payments clause.

(c) Unless otherwise directed by agency regulations in accordance with 32.104(c), if it is expected that the

award will be for less than \$1 million, the contracting officer shall insert the provision at 52.232-BC, Notice of Availability of Performance-Based Payments Exclusively for Small Business Concerns, in solicitations that include the Performance-Based Payment clause.

32.1006 Agency approvals.

The contracting officer shall obtain such approvals as are required by agency regulations.

32.1007 Administration of performance-based payments.

(a) *Administration.* The extent of supervision of performance-based payments shall vary inversely with the contractor's experience, performance record, reliability, quality of management, financial strength, and the adequacy of the records, accounts and controls established by the contractor for the administration of the clause. Supervision shall be of a kind and degree sufficient to provide timely knowledge of the need for, and timely opportunity for, any actions necessary to protect the Government's interests.

(b) *Approval of requests.* If the contracting officer has satisfied himself that the contractor's internal records and controls and management arrangements are accurate and reliable for all aspects of administration of performance-based payments, the contracting officer may rely upon those in approving any particular request for payment. In such event, the contracting officer shall determine the degree of risk to the Government's interests, and shall arrange an appropriate schedule of post-payment reviews and verifications. Where the contracting officer is not satisfied, the contracting officer shall require such reviews and verifications before approval for payment, as the contracting officer finds appropriate for the protection of the Government's interests.

32.1008 Suspension or reduction of performance-based payments.

(a) *General.* The Performance-Based Payments clause provides the Government the right to reduce or suspend performance-based payments or to increase the liquidation, under specified conditions. These conditions and actions are discussed in paragraphs (b) through (d) of this section.

(1) The contracting officer shall take these actions only in accordance with the contract terms and never precipitately or arbitrarily. These actions should be taken only after—

(i) Notifying the contractor of the intended action and providing an opportunity for discussion;

(ii) Evaluating the effect of the action on the contractor's operations, based on the contractor's financial condition, projected cash requirements, and the existing or available credit arrangements; and

(iii) Considering the general equities of the particular situation.

(2) The contracting officer shall take immediate unilateral action only if warranted by circumstances such as overpayments or unsatisfactory contract performance.

(3) In all cases, the contracting officer shall (i) act fairly and reasonably, (ii) base decisions on substantial evidence, and (iii) document the contract file. Findings made under paragraph (e) of the Performance-Based Payments clause at 52.232-BD shall be in writing.

(b) *Contractor noncompliance.* (1) The contractor must comply with all material requirements of the contract. This includes the requirement to maintain efficient and reliable records, accounts, and controls adequate for proper administration of the clause. If these are deemed inadequate, performance-based payments shall be suspended (or payments for events for which the records, accounts, or controls are unacceptable shall be suspended) until the necessary changes have been made.

(2) If the contractor fails to comply with the contract without fault or negligence, the contracting officer will not take action permitted by paragraph (e)(1) of the Performance-Based Payment clause at 52.232-BD, other than to correct overpayments and collect amounts due from the contractor (see also 32.1007(c)).

(c) *Unsatisfactory financial condition.*

(1) If the contracting officer finds that contract performance (including full liquidation of performance-based payments) is endangered by the contractor's financial condition, or by a failure to make progress, the contracting officer shall require the contractor to make additional operating or financial arrangements adequate for completing the contract without loss to the Government.

(2) If the contracting officer concludes that further performance-based payments would increase the probable loss to the Government, the contracting officer shall suspend performance-based payments and all other payments until the unliquidated balance of performance-based payments is eliminated.

(d) *Delinquency in payment of costs of performance.* If the contracting officer determines the contractor is delinquent in paying the costs of contract performance in the ordinary course of

business, the contracting officer shall evaluate whether the delinquency is caused by an unsatisfactory financial condition and, if so, shall apply the guidance in paragraph (c) of this section. If the contractor's financial condition is satisfactory, the contracting officer shall not deny performance-based payments if the contractor agrees to—

- (1) Cure the payment delinquencies;
- (2) Avoid further delinquencies; and
- (3) Make additional arrangements adequate for completing the contract without loss to the Government.

32.1009 Title.

(a) Since the Performance-Based Payment clause at 52.232-BD gives the Government title to all of the property described in paragraph (f) of the clause, the contracting officer must ensure that the Government title to this property is not compromised by other encumbrances. Ordinarily, the contracting officer, in the absence of reason to believe otherwise, may rely upon the contractor's certification contained in the payment request.

(b) If the contracting officer becomes aware of any arrangement or condition that would impair the Government's title to the property affected by the Performance-Based Payment clause at 52.232-BD, the contracting officer shall require additional protective provisions.

(c) The existence of any such encumbrance is a violation of the contractor's obligations under the contract, and the contracting officer may, if necessary, suspend or reduce payments under the terms of Performance-Based Payments clause covering failure to comply with a material requirement of the contract. In addition, if the contractor fails to disclose an existing encumbrance in the certification, the contracting officer should consult with legal counsel concerning possible violation of 31 U.S.C. 3729, the False Claims Act.

32.1010 Risk of loss.

(a) Under the Performance-Based Payments clause at 52.232-BD, and except for normal spoilage, the contractor bears the risk for loss, theft, destruction, or damage to property affected by the clause, even though title is vested in the Government, unless the Government has expressly assumed this risk. The clauses prescribed in 32.1005 related to performance-based payments, default, and terminations, do not constitute a Government assumption of risk.

(b) If a loss occurs in connection with property for which the contractor bears the risk and the property is part of or

needed for performance, the contractor is obligated to repay the Government the performance-based payments related to the property.

(c) The contractor is not obligated to pay for the loss of property for which the Government has assumed the risk of loss. However, a serious loss may impede the satisfactory progress of contract performance, so that the contracting officer may need to act under paragraph (e)(2) of the Performance-Based Payment clause. In addition, while the contractor is not required to repay previous performance-based payments in the event of a loss for which the Government has assumed the risk, such a loss may prevent the contractor from making the certification required by the Performance-Based Payments clause.

32.1011 Performance-based payments for events.

The following policy and procedures apply to the use of performance-based payments based upon specific events (milestones):

(a) The performance-based payment shall be based on a program event, identified to a specific contract line item or subline item, and liquidated by deduction of the performance-based payments from the price of the item in the contract.

(b) Each event for which a performance-based payment is established shall have a description of what constitutes successful performance.

(c) Because performance-based payments are liquidated by deduction from a specific delivery, each event for which a performance-based payment is established shall be part of the performance of a specific deliverable item under the contract.

(d) It is not required that the performance-based payment amount be based on the cost of performing an event; however, there must be a rational basis for the payment amount established.

(e) The contracting officer awarding the contract is responsible for establishing a complete, fully defined schedule of performance-based payments prior to award of the contract.

(f) The performance-based payments shall be set forth in the contract, be reasonably priced, and be based on meaningful program events.

(g) The contracting officer shall not approve a performance-based payment until the contractor has successfully performed the specified event, notwithstanding the contractor's failure to perform is without fault or negligence on the contractor's part. However, if a

contracting officer determines that the failure to perform was Government-caused (and it can be established that the contractor would have successfully performed the event otherwise), the effect upon the contractor of the delay in performance payment for the event may be considered if contract adjustment results.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

19. Sections 52.232-AA through 52.232-BD are added to read as follows:

§ 52.232-AA Standard Terms for Government Financing of Purchases of Commercial Items.

In accordance with 32.206(b)(2), insert the following clause:

Standard Terms for Government Financing of Purchases of Commercial Items (Date)

If contract financing will be provided under this contract, the terms and conditions of this clause shall apply, in addition to any other provisions of this contract. If the contract financing terms of this contract resulted from an Invitation to Propose Financing Terms (FAR 52.232-AC), no financing payment shall be made in any greater amount or at any earlier date than specified in the listing contained in the contractor's proposal as accepted by the contracting officer.

(a) *Reduction or suspension of payments.* The Contracting Officer may reduce or suspend financing payments, liquidate financing payments by deduction from any payment for accepted supplies or services under this or any other contract, or take a combination of these actions, after finding upon substantial evidence any of the following conditions—

(1) The Contractor failed to comply with any contract term or condition;

(2) Performance of this contract is endangered by the Contractor's unsatisfactory financial condition; or

(3) The Contractor fails to provide the Government, upon request, a satisfactory assurance of future performance.

(b) *Records, reports, and access.* The Contractor shall maintain records and controls adequate for administration of this clause. For the sole purpose of administering this clause, the Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information requested by the Contracting Officer, and shall give the Government reasonable opportunity to examine and verify the Contractor's records and controls required for administration of this clause, and to examine and verify the Contractor's performance of this contract.

(c) *Special terms regarding termination for cause.* If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated performance payments. The Government shall be liable for no payment except as provided by the Termination for Cause term of the clause at 52.212-4.

(d) *Reservation of rights.* (1) No payment under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract; and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(e) *Contractor certification and acknowledgment of criminal and civil penalties.* As required in the paragraph concerning the content of the Contractor's request for financing payment, the Contractor shall make the following certification in each request for financing payment:

I certify to the best of my knowledge and belief that—

(1) This request for financing payment is true and correct;

(2) All payments requested are properly due in accordance with the contract, and that except as disclosed to the Contracting Officer by written communication dated _____, the deliverable items for which payments are requested will be delivered or performed in accordance with the contract;

(3) There has been no impairment or diminution of the Government's security under this contract (except as reported in writing on _____);

(4) There has been no materially adverse change in the financial condition of the Contractor since the submission by the Contractor to the Government of the most recent written information dated _____; and,

(5) After the making of this requested Financing Payment, the amount of all such payments will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the contract.

(6) I understand that inaccurate information provided to the Government may subject me and/or others to civil and/or criminal penalties for false claims or false statements pursuant to 31 U.S.C. 3729 and 18 U.S.C. 1001.

(f) *Security for Government financing.* In the event the Contractor fails to provide adequate security, as required in this contract, no financing payment shall be made under this contract. Upon receipt of the adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may find the Contractor to have failed to comply with a requirement of the contract as

provided in paragraph (a), Reduction or suspension of payments.

(g) *Content of Contractor's request for financing payment term.* The Contractor's request for financing payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for Financing Payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made;

(4) An appropriately itemized and totaled statement of the financing payments requested and such other information as is necessary for computation of the payment, prepared in accordance with the direction of the Contracting Officer; and

(5) A certification by a Contractor official authorized to bind the Contractor, as specified in paragraph (e), Contractor certification and acknowledgment of criminal and civil penalties.

(End of clause)

§ 52.232-AB Installment Payments for Commercial Items.

As prescribed in 32.206(e), insert the following clause:

Installment Payments for Commercial Items (Date)

Installment financing payments shall be made to the Contractor when requested, as work progresses, but not more frequently than monthly, in amounts approved by the Contracting Officer under the following conditions:

(a) *Computation of amounts.* Installment payment financing shall be paid to the Contractor when requested for each separately priced unit of supply (but not for services) of each contract line item in amounts approved by the Contracting Officer pursuant to this clause.

(1) *Number of installment payments for each contract line item.* Each separately priced unit of each contract line item is authorized a fixed number of monthly installment payments. The number of installment payments authorized for each unit of a contract line item is equal to the number of months from the date of contract award to the date one month before the first delivery of the first separately priced unit of the contract line item. For example, if the first scheduled delivery of any separately priced unit of a contract line item is nine (9) months after award of the contract, all separately priced units of that contract line item are authorized eight (8) installment payments.

(2) *Amount of each installment payment.* The amount of each installment payment for each separately priced unit of each contract line item is equal to 70 percent of the unit price divided by the number of installment payments authorized for that unit.

(3) *Date of each installment payment.* Installment payments for any particular separately priced unit of a contract line item begin the number of months prior to the delivery of that unit that are equal to the number of installment payments authorized for that unit. For example, if eight (8)

installment payments are authorized for each separately priced unit of a contract line item, the first installment payment for any particular unit of that contract line item would be eight (8) months before the scheduled delivery date for that unit. The last installment payment is due one (1) month before scheduled delivery of a unit.

(4) *Limitation on Payment.* Prior to the payment for acceptance of a separately priced unit of a contract line item, the sum of all installment payments for that unit shall not exceed 70 percent of the price of that unit.

(b) *Contractor request for installment payment.* The Contractor may submit Requests for Payment of Installment Payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all installments in any month for which payment is being requested shall be included in a single request, appropriately itemized and totaled.

(c) *Adequate progress and approval for payment.* An installment payment under this clause is a contract financing payment under the Prompt Payment clause of this contract, and except as provided below, approved requests shall be paid within thirty (30) days of submittal of a proper request for payment. Payment is not required, and the prompt payment period shall not begin, until the Contracting Officer approves the request, if the Contracting Officer—

(1) Requires substantiation of adequate progress;

(2) Inquires into the status of performance;

(3) Inquires into any of the conditions listed in paragraph (e), Reduction or suspension of payments, of this clause; or

(4) Inquires into the Contractor certification.

(d) *Liquidation of installment payments.*

(1) Installment payments shall be liquidated by deducting from the invoice payment made upon acceptance of each item the total unliquidated amount of installment payments made for that separately priced unit of that contract line item.

(2) If at any time the amount of payments under this contract exceeds any limitation in this contract, the Contractor shall repay to the Government the excess. Unless otherwise determined by the Contracting Officer, such excess shall be credited as a reduction in the unliquidated installment payment balance(s) for the related deliverable item(s), after adjustment of delivery payments and balances for any retroactive price adjustments.

(3) The liquidation amounts for each unit of each line item shall be clearly delineated in each request for delivery payment submitted by the Contractor.

(e) *Reduction or suspension of installment payments.* The Contracting Officer may reduce or suspend Installment Payments, liquidate Installment Payments by deduction from any payment for accepted supplies or services under this or any other contract, or take a combination of these actions, after finding upon substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any contract term or condition;

(2) Performance of this contract is endangered by the Contractor's unsatisfactory financial condition; or

(3) The Contractor fails to provide the Government, upon request, a satisfactory assurance of future performance.

(f) *Security for installment payment financing.* In the event the Contractor fails to provide adequate security as required in this contract, no financing payment shall be made under this contract. Upon receipt of the adequate security, financing payments shall be made, including all previous payments to which the Contractor is entitled, in accordance with the terms of the provisions for contract financing. If at any time the Contracting Officer determines that the security provided by the Contractor is insufficient, the Contractor shall promptly provide such additional security as the Contracting Officer determines necessary. In the event the Contractor fails to provide such additional security, the Contracting Officer may find the Contractor to have failed to comply with a material requirement of the contract as provided in paragraph (e), Reduction or suspension of installment payments, of this clause.

(g) *Records, reports, and access.* The Contractor shall maintain records and controls adequate for administration of this clause. For the sole purpose of administering this clause, the Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information requested by the Contracting Officer, and shall give the Government reasonable opportunity to examine and verify the Contractor's records and controls required for administration of this clause, and to examine and verify the Contractor's performance of this contract.

(h) *Special terms regarding termination for cause.* If this contract is terminated for cause, the Contractor shall, on demand, repay to the Government the amount of unliquidated performance payments. The Government shall be liable for no payment except as provided by the Termination for Cause term of the clause at 52.212-4.

(i) *Reservation of rights.* (1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract, and (ii) shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(j) *Content of Contractor's request for installment payment.* The Contractor's request for installment payment shall contain the following:

(1) The name and address of the Contractor;

(2) The date of the request for Installment Payment;

(3) The contract number and/or other identifier of the contract or order under which the request is made;

(4) An itemized and totaled statement of the items, related deliverable items, and installment payment(s) being requested for each separately priced unit of each contract line item; and

(5) A certification by a Contractor official authorized to bind the Contractor, as specified in paragraph (k).

(k) *Contractor certification.* As required in paragraph (j)(5) of this clause, the Contractor shall make the following certification in each Request for Installment Payment:

I certify to the best of my knowledge and belief that—

(1) This request for installment payment is true and correct;

(2) All installment payments requested are properly due in accordance with the contract, and that except as disclosed to the Contracting Officer by written communication dated _____, the deliverable items for which Installment Payments are requested will be delivered or performed in accordance with the contract;

(3) There are no encumbrances (except as reported in writing on _____) against the property acquired or produced for, and allocated or properly chargeable to the contract which would affect or impair the Government's security;

(4) There has been no materially adverse change in the financial condition of the Contractor since the submission by the Contractor to the Government of the most recent written information dated _____; and,

(5) After the making of this requested Installment Payment, the amount of all payments for each deliverable item for which Installment Payments have been requested will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the contract.

(6) I understand that inaccurate information provided to the Government may subject me and/or others to civil and/or criminal penalties for false claims or false statements pursuant to 31 U.S.C. 3729 and 18 U.S.C. 1001.

(End of clause)

52.232-AC Invitation to Propose Financing Terms.

The contracting officer shall include this provision as specified in 32.205(b) and 32.206.

Invitation to Propose Financing Terms (Date)

(a) The offeror is invited to propose terms under which the Government shall make contract financing payments to the contractor during performance of this contract. The financing terms proposed by the offeror shall be a factor in the evaluation of the contractor's proposal. The financing terms of the successful offeror and the clause, Standard Terms for Government Financing of Purchases of Commercial Items, at 52.232-AA, shall be incorporated in any resulting contract.

(b) The offeror agrees that in the event of any conflict between the terms proposed by

the offeror and the terms in the clause Standard Terms for Government Financing of Purchases of Commercial Items at 52.232-AA, the terms of the clause Standard Terms for Government Financing of Purchases of Commercial Items at 52.232-AA shall govern.

(c) Because of statutory limitations (10 U.S.C. 2307(f) and 41 U.S.C. 255(f)), the offeror's proposed financing shall not be acceptable if it does not conform to the following limitations:

(1) Delivery payments shall be made only for supplies delivered and accepted, or services rendered and accepted in accordance with the Payment term,

(2) Contract financing payments shall not exceed 15 percent of the contract price in advance of any performance of work under the contract,

(3) The terms and conditions of the contract financing must be appropriate or customary in the commercial marketplace, and

(4) The terms and conditions of the contract financing must be in the best interest of the United States.

(d) The offeror's proposal of financing terms shall include the following:

(1) The proposed contractual language describing the contract financing (see FAR 32.202-3 for appropriate definitions of types of payments),

(2) A listing of the earliest time and greatest amount at which each contract financing payment may be payable and the amount of each delivery payment. Any resulting contract shall provide that no contract financing payment shall be made at any earlier time or in any greater amount than shown in the offeror's listing.

(e) The offeror's proposed prices and financing terms shall be evaluated to determine the cost to the United States of the proposal. This evaluation shall be done using the interest rate and delivery schedule specified elsewhere in this solicitation.

(End of provision)

52.232-BB Notice of Performance-Based Payments.

As prescribed in 32.1005(b), insert the following provision:

Notice of Performance-Based Payments (Date)

The need for customary performance-based payments conforming to the regulations in Subpart 32.10 of the Federal Acquisition Regulation (FAR) will not be considered as a handicap or adverse factor in the award of the contract. The Performance-Based Payments clause included in this solicitation, and the description of the basis for payment and liquidation, will be included in any resulting contract. Even though the clause is included in the contract, the clause shall be inoperative during any time the Contractor's records, accounts, or controls are determined by the Government to be inadequate for administration of this clause.

(End of provision)

52.232-BC Notice of Availability of Performance-Based Payments Exclusively for Small Business Concerns.

As provided in 32.1005(c), insert the following provision:

Notice of Availability of Performance-Based Payments Exclusively for Small Business Concerns (Date)

The Performance-Based Payments clause will be available only to small business concerns. Any bid conditioned upon inclusion of a performance-based payment clause in the resulting contract will be rejected as nonresponsive if the bidder is not a small business concern.

(End of provision)

52.232-BD Performance-Based Payments.

As prescribed in 32.1005(a), insert the following clause:

Performance-Based Payments (Date)

In accordance with the provisions of this clause, and the contract's description of the basis for payment, the Contractor shall be paid contract financing payments based upon performance under the following conditions:

(a) *Amount of payments and limitations on payments.* Subject to such other limitations and conditions as are specified in this contract and this clause, the amount of payments and limitations on payments shall be specified in the contract's description of the basis for payment.

(b) *Contractor request for performance-based payment.* The Contractor may submit Requests for Payment of Performance-Based Payments not more frequently than monthly, in a form and manner acceptable to the Contracting Officer. Unless otherwise authorized by the Contracting Officer, all basis for payment in any period for which payment is being requested shall be included in a single request, appropriately itemized and totaled. The Contractor's request shall contain the information and certification detailed in paragraphs (l) and (m) of this clause.

(c) *Approval and payment of requests.* (1) The Contractor shall not be entitled to payment of a Request for Performance-Based Payment prior to successful accomplishment of the event or performance criteria for which payment is requested. The Contracting Officer shall determine whether the event or performance criteria for which payment is requested has been successfully accomplished in accordance with the terms of the contract. The Contracting Officer may, at any time, require the Contractor to substantiate the event or performance criteria which has been or is represented as being payable.

(2) A payment under this Performance-Based Payment clause is a contract financing payment under the Prompt Payment clause of this contract, and approved requests shall be paid in accordance with the prompt payment period and provisions specified for Contract Financing Payments by that clause provided, however, if the Contracting Officer requires substantiation as provided in paragraph (c)(1) of this clause, or inquires into the status of

an event or performance criteria, or into any of the conditions listed in paragraph (e), Reduction or Suspension of Payments, of this clause, or into the contractor certification, payment is not required, and the prompt payment period shall not begin until the Contracting Officer approves the request.

(3) The approval by the Contracting Officer of a Request for Performance-Based Payment does not constitute an acceptance by the Government and does not excuse the Contractor from performance of obligations under this contract.

(d) *Liquidation of performance-based payments.* (1) Performance-based finance amounts paid prior to payment for delivery and acceptance of an item shall be liquidated by deducting a percentage or the designated dollar amount from the delivery payment. If the performance-based finance payments are on a delivery item basis, the liquidation amount for each such line item shall be the percent of that delivery item price that was previously paid under performance-based finance payments or the designated dollar amount. If the performance-based finance payments are on a whole contract basis, liquidation shall be by either predesignated liquidation amounts or a liquidation percentage. If a liquidation percentage is used, the liquidation percentage for each line item shall be the percent of the total contract price that was previously paid under performance-based finance payments. In order to ensure proper liquidation, performance-based financing payments made after any payment for a deliverable item shall be adjusted to reflect the amount of previous delivery payments.

(2) If at any time the amount of payments under this contract exceeds any limitation in this contract, the Contractor shall repay to the Government the excess. Unless otherwise determined by the Contracting Officer, such excess shall be credited as a reduction in the unliquidated performance-based payment balance(s), after adjustment of invoice payments and balances for any retroactive price adjustments.

(e) *Reduction or suspension of performance-based payments.* The Contracting Officer may reduce or suspend performance-based payments, liquidate performance-based payments by deduction from any payment under the contract, or take a combination of these actions after finding upon substantial evidence any of the following conditions:

(1) The Contractor failed to comply with any material requirement of this contract (which includes paragraphs (h) and (i) of this clause).

(2) Performance of this contract is endangered by the Contractor's (i) failure to make progress, or (ii) unsatisfactory financial condition.

(3) The Contractor is delinquent in payment of any subcontractor or supplier under this contract in the ordinary course of business.

(f)(1) *Title.* Title to the property described in this paragraph (f) shall vest in the Government. Vestiture shall be immediately upon the date of the first performance-based payment under this contract, for property acquired or produced before that date.

Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) *Property*, as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices:

(i) Parts, materials, inventories, and work in process,

(ii) Special tooling and special test equipment to which the Government is to acquire title under any other clause of this contract,

(iii) Nondurable (*i.e.*, noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (f)(2)(ii) of this clause, and

(iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.

(3) Although title to property is in the Government under this clause, other applicable clauses of this contract, (*e.g.*, the termination or special tooling clauses), shall determine the handling and disposition of the property.

(4) The Contractor may sell any scrap resulting from production under this contract, without requesting the Contracting Officer's approval, provided that any significant reduction in the value of the property to which the Government has title under this clause is reported in writing to the Contracting Officer.

(5) In order to acquire for its own use or dispose of property to which title is vested in the Government under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. If approved, the basis for payment to which the property is related shall be deemed to be not in compliance with the terms of the contract and not payable (if the property is part of or needed for performance), and the Contractor shall refund the related performance-based payments in accordance with paragraph (d) of this clause.

(g) *Risk of loss.* Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. If any property is damaged, lost, stolen, or destroyed, the basis of payment to which the property is related shall be deemed to be not in compliance with the terms of the contract and not payable (if the property is part of or needed for performance), and the Contractor shall refund the related performance-based payments in accordance with paragraph (d) of this clause.

(h) *Records and controls.* The Contractor shall maintain records and controls adequate for administration of this clause.

(i) *Reports and Government access.* The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information requested by the

Contracting Officer for the administration of this clause and to determine that an event or other criteria prompting a financing payment has been successfully accomplished. The Contractor shall give the Government reasonable opportunity to examine and verify the Contractor's records and to examine and verify the Contractor's performance of this contract for administration of this clause.

(j) *Special terms regarding default.* If this contract is terminated under the Default clause, (1) the Contractor shall, on demand, repay to the Government the amount of unliquidated performance payments, and (2) title shall vest in the Contractor, on full liquidation of all performance-based payments, for all property for which the Government elects not to require delivery under the Default clause of this contract. The Government shall be liable for no payment except as provided by the Default clause.

(k) *Reservation of rights.* (1) No payment or vesting of title under this clause shall (i) excuse the Contractor from performance of obligations under this contract, or (ii) constitute a waiver of any of the rights or remedies of the parties under the contract.

(2) The Government's rights and remedies under this clause (i) shall not be exclusive, but rather shall be in addition to any other rights and remedies provided by law or this contract, and (ii) shall not be affected by delayed, partial, or omitted exercise of any

right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or the exercise of any other right, power, or privilege of the Government.

(l) *Content of Contractor's request for performance-based payment.* The Contractor's Request for Performance-Based Payment shall contain the following:

(1) The name and address of the Contractor,

(2) The date of the request for Performance-Based Payment,

(3) The contract number and/or other identifier of the contract or order under which the request is made,

(4) Such information and documentation as is required by the contract's description of the basis for payment, and

(5) A certification by a Contractor official authorized to bind the Contractor, as specified in paragraph (m).

(m) *Content of Contractor's certification.* As required in paragraph (l)(5) of this clause, the Contractor shall make the following certification in each Request for Performance-Based Payment:

I certify to the best of my knowledge and belief—

(1) That this Request for Performance-Based Payment is true and correct; that this Request (and attachments) has been prepared from the books and records of the Contractor,

in accordance with the contract, and the instructions of the Contracting Officer;

(2) That (except as reported in writing on _____), all payments to subcontractors and suppliers under this contract have been paid, or will be paid, currently, when due in the ordinary course of business;

(3) That there are no encumbrances (except as reported in writing on _____) against the property acquired or produced for, and allocated or properly chargeable to the contract which would affect or impair the Government's title;

(4) That there has been no materially adverse change in the financial condition of the Contractor since the submission by the Contractor to the Government of the most recent written information dated _____; and

(5) That after the making of this requested Performance-Based Payment, the amount of all payments for each deliverable item for which Performance-Based Payments have been requested will not exceed any limitation in the contract, and the amount of all payments under the contract will not exceed any limitation in the contract.

(End of clause)

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